

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

**JAN 18 2007**

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

MICHAEL ALAN JOHNSON; et al.,

Plaintiffs - Appellants,

v.

CITY OF SEATTLE, a municipal  
corporation; et al.,

Defendants - Appellees.

No. 05-35319

D.C. No. CV-03-02418-RSL

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Western District of Washington  
Robert S. Lasnik, District Judge, Presiding

Argued and Submitted November 13, 2006  
Seattle, Washington

Before: ALARCÓN, RYMER, and BERZON, Circuit Judges.

Michael A. Johnson and ten other persons (the “Pioneer Square Plaintiffs”) appeal from the district court’s order granting summary judgment in favor of the City of Seattle, Paul Schell (former Mayor of Seattle), and R. Gil Kerlikowske

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<sup>\*</sup> This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

(Chief of the Seattle Police Department) in this action filed pursuant to 42 U.S.C. § 1983. The Pioneer Square Plaintiffs contend that the district court erred in relying on the public duty doctrine in granting summary judgment on their state law negligence claim. We affirm.

Because the facts are known to the parties, we need not summarize them in this non-published disposition.

The complaint alleges that the “Defendants’ acts and omissions were negligent and proximately caused injury to plaintiffs.” Even assuming that the Defendants were negligent in providing police protection to the crowd gathered in Pioneer Square, the Pioneer Square Plaintiffs have failed to demonstrate that the police owed a duty to them as individuals.

Under the public duty doctrine, no liability may be imposed for a public official’s negligent conduct unless it is shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (*i.e.*, a duty to all is a duty to no one).

*Cummins v. Lewis County*, 133 P.3d 458, 461 (Wash. 2006) (internal quotations omitted).

Alternatively, the Pioneer Square Plaintiffs argue that they come within the failure to enforce exception, the legislative intent exception, and the rescue doctrine exception to the public duty doctrine. We disagree.

The failure to enforce exception applies if “[1] governmental agents are responsible for enforcing statutory requirements [2] possess actual knowledge of a statutory violation, [3] fail to take corrective action despite a statutory duty to do so, and [4] the plaintiff is within the class the statute intended to protect.” *Honcoop v. State*, 759 P.2d 1188, 1193 (Wash. 1988) (internal citation omitted).

The Pioneer Square Plaintiffs claim that the failure to enforce exception applies because the Seattle Police Department was statutorily required to arrest their assailants. This contention is contrary to Washington law. Under Washington law, police officers “having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant,” and “may arrest . . . for [] a misdemeanor or gross misdemeanor . . . committed in the presence of the officer.” Wash. Rev. Code § 10.31.100. Section 10.31.100 does not create a mandatory duty to arrest for an assault. It merely authorizes an officer to arrest a person for a felony not committed in the officer’s presence without a warrant, and to arrest a person for a misdemeanor or gross misdemeanor committed in the officer’s presence. The

Pioneer Square Plaintiffs have failed to cite any authority that suggests that the authority to arrest set forth in § 10.31.100 creates a mandatory duty to do so.

Washington State law does require officers to take into custody publicly incapacitated individuals who threaten others. Wash. Rev. Code § 70.96A.120(2); *Bailey v. Forks*, 737 P.2d 1257, 1260 (Wash. 1987). The record does not establish, however, that the Defendants knew at the time that the Pioneer Square Plaintiffs were threatened or being harmed by drunk individuals.

The legislative intent exception to the public duty doctrine is also inapplicable here. “In order for the legislative intent exception to apply, the regulation establishing a duty must intend to identify and protect a particular and circumscribed class of persons, and this intent must be clearly expressed within the provision—it will not be implied.” *Ravenscroft v. Water Power Co.*, 969 P.2d 75, 85 (Wash. 1998). In applying this exception, Washington courts have looked to Washington state statutes to find legislative intent. *See, e.g., Honcoop v. State*; 759 P.2d 1188, 1192-93 (Wash. 1988) (relying on Washington’s brucellosis statutes and regulations to determine legislative intent); *Bailey v. Town of Forks*, 737 P.2d 1257, 1260-61 (Wash. 1987) (relying on Wash. Rev. Code § 46.61.515 and Wash. Rev. Code § 70.96A.120(2) for legislative intent); *Donaldson v. City of Seattle*,

831 P.2d 1098, 1101 (Wash. Ct. App. 1992) (relying on Wash. Rev. Code § 10.99.010 for legislative intent).

The Pioneer Square Plaintiffs have failed to cite any Washington regulation expressly stating that police officers have a duty to protect a crowd gathered in public to celebrate a special event as a particular and circumscribed class of persons that deserves special protection. Furthermore, the Pioneer Square Plaintiffs' reliance upon 42 U.S.C. § 1983 for legislative intent is misplaced, as "[s]ection 1983 does not create any substantive rights, but is instead a vehicle by which plaintiffs can bring federal constitutional and statutory challenges to actions by state and local officials." *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006).

The Pioneer Square Plaintiffs' reliance on the rescue doctrine exception is also misplaced. The rescue doctrine applies "if an injured party reasonably relies on the assurances of a negligent rescuer." *Osborn v. Mason County*, 134 P.3d 197, 200 (Wash. 2006). The Pioneer Square Plaintiffs have not presented any evidence to support this contention. The record discloses no evidence of communication between the Seattle police officers and the Pioneer Square Plaintiffs before or at the time of the incident.

**AFFIRMED.**<sup>1</sup>

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<sup>1</sup>We address the Pioneer Square Plaintiffs' § 1983 claim in a published opinion filed concurrently with this memorandum disposition.